



DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Parts 3 and 20

RIN 2900-AO43

Rules Governing Hearings Before the Agency of Original Jurisdiction and the Board of Veterans' Appeals; Repeal of Prior Rule Change

AGENCY: Department of Veterans Affairs.

ACTION: Direct final rule.

SUMMARY: The Department of Veterans Affairs (VA) is taking final action to amend its hearing regulations to repeal a prior amendment that specified that the provisions regarding hearings before the Agency of Original Jurisdiction (AOJ) do not apply to hearings before the Board of Veterans' Appeals (Board). This action is being taken because of VA's decision that the prior amendment should have followed the notice-and-comment procedure of the Administrative Procedure Act (APA).

DATES: This rule is effective [insert 60 days after the date of publication in the Federal Register], without further notice, unless VA receives a significant adverse comment by [insert 30 days after the date of publication in the Federal Register]. If adverse comment is received, VA will publish a timely withdrawal of the rule in the Federal Register.

ADDRESSES: Written comments may be submitted through www.Regulations.gov; by mail or hand-delivery to the Director, Regulations Management (02REG), Department of

Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to (202) 273-9026. Comments should indicate that they are submitted in response to “RIN 2900-AO43—Rules Governing Hearings Before the Agency of Original Jurisdiction and the Board of Veterans’ Appeals; Repeal of Prior Rule Change.” Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m. Monday through Friday (except holidays). Please call (202) 461-4902 for an appointment (this is not a toll-free number). In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at www.Regulations.gov.

FOR FURTHER INFORMATION CONTACT: Laura H. Eskenazi, Principal Deputy Vice Chairman, Board of Veterans’ Appeals (01C2), Department of Veterans Affairs, 810 Vermont Avenue, N.W., Washington, DC 20420, (202) 632-4603. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On August 23, 2011, VA issued a final rule, “Rules Governing Hearings Before the Agency of Original Jurisdiction and the Board of Veterans’ Appeals; Clarification,” 76 FR 52572 (RIN 2900-AO06), revising VA’s regulations to specify that the provisions governing hearings in 38 CFR 3.103 only apply to hearings conducted before the AOJ and that the provisions in part 20 govern hearings before the Board. The revision was made because of a decision by the United States Court of Appeals for Veterans Claims (Court) in Bryant v. Shinseki, 23 Vet. App.

488 (2010), which applied the provisions of § 3.103(c)(2) to a Board hearing. The Bryant Court held that the provisions of § 3.103(c)(2) require a “Board hearing officer” to “fully explain the issues still outstanding that are relevant and material to substantiating the claim” and to “suggest that a claimant submit evidence on an issue material to substantiating the claim when the record is missing any evidence on that issue or when the testimony at the hearing raises an issue for which there is no evidence in the record.” Id. at 496-97.

RIN 2900-AO06, among other things, altered the language upon which the Bryant Court relied. VA has determined that RIN 2900-AO06 should have followed the notice-and-comment procedure of 5 U.S.C. 553(b) and (c) of the APA. Accordingly, in this direct-final rule, VA is repealing the amendments made by RIN 2900-AO06.

Based on the rationale set forth in this preamble, VA amends, in part 3, § 3.103(a) and (c)(1), and, in part 20, § 20.706 and Appendix A, to return the regulations to the language in effect before August 23, 2011.

Administrative Procedure Act

VA believes this rule is non-controversial, anticipates that this rule will not result in any significant adverse comment, and therefore is issuing it as a direct final rule.

For purposes of the direct final rulemaking, a significant adverse comment is one that explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or why it would be ineffective or unacceptable without a change. In determining whether an adverse comment is significant and warrants withdrawing a direct final rule, we will consider whether the comment raises an issue

serious enough to warrant a substantive response in a notice-and-comment process in accordance with section 553 of the APA (5 U.S.C. 553). Comments that are frivolous, insubstantial, or outside the scope of the rule will not be considered adverse under this procedure. For example, a comment recommending an additional change to the rule will not be considered a significant comment unless the comment states why the rule would be ineffective without the additional change.

Under direct final rule procedures, if no significant adverse comment is received within the comment period, the rule will become effective on the date specified above. After the close of the comment period, VA will publish a document in the Federal Register indicating that no significant adverse comment was received and confirming the effective date of the rule.

However, if any significant adverse comment is received, VA will publish in the Federal Register a notice acknowledging receipt of a significant adverse comment and withdrawing the direct final rule. We will then publish in the Federal Register a proposed rule document, which will be substantially identical to this direct final rule and will serve as a proposal for the amendments in this direct final rule. Any comments received in response to the direct final rule will be treated as comments regarding the proposed rule. VA will consider such comments in developing a subsequent final rule.

Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521).

Regulatory Flexibility Act

The Secretary hereby certifies that this regulatory amendment will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601- 612. This rulemaking will not directly affect any small entities. Only VA beneficiaries will be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this amendment is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a “significant regulatory action,” which requires review by the Office of Management and Budget (OMB), as “any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the

budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order."

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined and it has been determined not to be a significant regulatory action under Executive Order 12866.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any given year. This rule will have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance program numbers and titles for this rule are 64.027, Post-9/11 Veterans Educational Assistance; 64.028, Post-9/11 Veterans Educational Assistance; 64.032, Montgomery GI Bill Selected Reserve; Reserve Educational Assistance Program; 64.100, Automobiles and Adaptive Equipment for Certain Disabled Veterans and Members of the Armed Forces; 64.101, Burial Expenses Allowance for Veterans; 64.103, Life Insurance for Veterans; 64.104,

Pension for Non-Service-Connected Disability for Veterans; 64.105, Pension to Veterans Surviving Spouses, and Children; 64.106, Specially Adapted Housing for Disabled Veterans; 64.109, Veterans Compensation for Service-Connected Disability; 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death; 64.114, Veterans Housing-Guaranteed and Insured Loans; 64.115, Veterans Information and Assistance; 64.116, Vocational Rehabilitation for Disabled Veterans; 64.117, Survivors and Dependents Educational Assistance; 64.118, Veterans Housing-Direct Loans for Certain Disabled Veterans; 64.119, Veterans Housing-Manufactured Home Loans; 64.120, Post-Vietnam Era Veterans' Educational Assistance; 64.124, All-Volunteer Force Educational Assistance; 64.125, Vocational and Educational Counseling for Servicemembers and Veterans; 64.126, Native American Veteran Direct Loan Program; 64.127, Monthly Allowance for Children of Vietnam Veterans Born with Spina Bifida; and 64.128, Vocational Training and Rehabilitation for Vietnam Veterans' Children with Spina Bifida or Other Covered Birth Defects.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, Department of Veterans Affairs, approved this document on April 10, 2012, for publication.

List of Subjects

38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Radioactive materials, Veterans, Vietnam.

38 CFR Part 20

Administrative practice and procedure, Claims, Veterans.

Dated: April 13, 2012

Robert C. McFetridge,
Director of Regulation Policy and Management,
Office of the General Counsel,
Department of Veterans Affairs.

For the reasons set forth in the preamble, VA amends 38 CFR parts 3 and 20 as follows:

PART 3 – ADJUDICATION

Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

1. The authority citation for part 3, subpart A continues to read as follows:

AUTHORITY: 38 U.S.C. 501(a), unless otherwise noted.

2. Amend § 3.103 by:

- a. Removing the last two sentences of paragraph (a) and adding, in its place, “The provisions of this section apply to all claims for benefits and relief, and decisions thereon, within the purview of this part 3.”.

- b. Revising paragraph (c)(1).

The revision reads as follows:

§ 3.103 Procedural due process and appellate rights.

* * * * *

(c) * * * (1) Upon request, a claimant is entitled to a hearing at any time on any issue involved in a claim within the purview of part 3 of this chapter, subject to the limitations described in § 20.1304 of this chapter with respect to hearings in claims

which have been certified to the Board of Veterans' Appeals for appellate review. VA will provide the place of hearing in the VA office having original jurisdiction over the claim or at the VA office nearest the claimant's home having adjudicative functions, or, subject to available resources and solely at the option of VA, at any other VA facility or federal building at which suitable hearing facilities are available. VA will provide one or more employees who have original determinative authority of such issues to conduct the hearing and be responsible for establishment and preservation of the hearing record. Hearings in connection with proposed adverse actions and appeals shall be held before one or more VA employees having original determinative authority who did not participate in the proposed action or the decision being appealed. All expenses incurred by the claimant in connection with the hearing are the responsibility of the claimant.

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PART 20 – BOARD OF VETERANS' APPEALS: RULES OF PRACTICE

3. The authority citation for part 20 continues to read as follows:

AUTHORITY: 38 U.S.C. 501(a) and as noted in specific sections.

Subpart H—Hearings on Appeal

4. Revise § 20.706 to read as follows:

§ 20.706 Rule 706. Functions of the presiding Member.

The presiding Member of a hearing panel is responsible for the conduct of the hearing, administration of the oath or affirmation, and for ruling on questions of procedure. The presiding Member will assure that the course of the hearing remains relevant to the issue, or issues, on appeal and that there is no cross-examination of the parties or witnesses. The presiding Member will take such steps as may be necessary to maintain good order at hearings and may terminate a hearing or direct that the offending party leave the hearing if an appellant, representative, or witness persists in disruptive behavior.

5. Amend the table in Appendix A to Part 20 by:

- a. Adding entry 20.1.
- b. Revising entry 20.1304.

The revision and addition read as follows:

APPENDIX A TO PART 20—CROSS-REFERENCES

Sec.	Cross-reference	Title of cross-referenced material or comment
20.1.....	38 CFR 3.103(a)	<u>Statement of policy.</u>
* * *	* * *	* * *
20.1304.....	38 CFR 3.103(c), 20.700-20.717 38 CFR 3.156.....	See also re hearings. <u>New and material</u>

		<u>evidence.</u>
	38 CFR 3.160(e)	<u>Reopened claim.</u>
	38 CFR 20.305.....	<u>Rule 305.</u>
		<u>Computation of time</u>
		<u>limit for filing.</u>
	38 CFR 20.306.....	<u>Rule 306. Legal</u>
		<u>holidays.</u>

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